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In the Supreme Court of the United States

OCTOBER TERM, 1996

BARBARA A. DE BUONO, NEW YORK STATE COMMISSIONER OF HEALTH, ET AL., PETITIONERS

v.

NYSA-ILA MEDICAL AND CLINICAL SERVICES FUND, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a state tax on the "gross receipts received from all patient care services and other operating income" of hospitals licensed to operate in the State "relate[s] to" employee welfare benefit plans within the meaning of Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), and is thus preempted, insofar as the tax applies to the income of medical centers owned and operated by an ERISA plan.

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INTEREST OF THE UNITED STATES

This case presents questions concerning the scope of the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001-1169; see 29 U.S.C. 1144. The Secretary of Labor is primarily responsible for enforcing and administering Title I of ERISA. See 29 U.S.C. 1002(13), 1136(b). The United States therefore has a substantial interest in the resolution of the question presented. In response to the Court's invitation, the United States filed a brief at the petition stage of this case urging that certiorari be granted.

STATEMENT

1. In 1990 New York State enacted a tax, known as the Health Facility Assessment (HFA), in order to raise revenue and avoid reductions in the State's Medicaid program. Pet. App. 7a; C.A. App. 46, 51, 56, 59. With certain exceptions not relevant here, the assessment is imposed on all "[h]ospitals" operating in the State. The statute defines the term "hospital" to include a broad range of facilities that provide health care services under the supervision of a physician or dentist, and expressly encompasses a "diagnostic center" and a "treatment center." N.Y. Pub. Health Law §§ 2801(1), 2807-d(1)(a) (McKinney 1993). The assessment is calculated as a percentage of the hospital's "gross receipts received from all patient care services and other operating income." *Id.* § 2807-d(1)(a).[1] The percentage differs for three types of hospitals, see *id.* § 2807-d(2)(a) to (c), but is assessed at 0.6% for diagnostic and treatment centers.

The law requires hospitals to make monthly payments of the assessment to the health commissioner or her designee, who remits the accumulated monies to the State's general fund. N.Y. Pub. Health Law § 2807-d(1)(a), (5), (7)(d) and (9) (McKinney 1993); see C.A. App. 60. Hospitals must also submit quarterly reports, and a certified annual report, of their gross receipts that are subject to the tax.

[1] Receipts from "patient care services" refers to "all monies received for or on account of hospital or health-related services," including preadmission, out-patient, in-patient, and post discharge care, and items such as nursing service, ambulance service, laboratory service, medical social service, drugs, supplies, and room and board. N.Y. Pub. Health Law §§ 2801(4)(a) and (b), 2807-d(3)(c) (McKinney 1993). "Operating income" includes "monies received for or on account of such revenue sources as investment income, parking lots, cafeterias, gift shops and rental income," with certain exclusions. N.Y. Pub. Health Law § 2807-d(3)(d) (McKinney 1993); see C.A. App. 65.

N.Y. Pub. Health Law § 2807-d(7)(a) and (b) (McKinney 1993); see C.A. App. 60.

2. Respondents are the trustees of the NYSA-ILA Medical and Clinical Services Fund (Fund). The Fund is a labor-management trust governed by Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. 186. The Fund was established pursuant to an Agreement and Declaration of Trust and Plan and collective bargaining agreements between the New York Shipping Association, Inc., and the International Longshoremen's Association covering longshore employment in the Port of New York and New Jersey. Pet. App. 7a; C.A. App. 19. The Fund administers a self-insured, ERISA-covered multi-employer welfare benefit plan, see 29 U.S.C. 1002(1) and (37); 26 U.S.C. 414(f), that provides medical, dental and other health services on an outpatient basis through three medical centers that it owns and operates. Pet. App. 7a. The two centers at issue here are located in New York and are licensed by the State to operate as diagnostic and treatment centers. Pet. 4; see N.Y. Public Health Law § 2805 (McKinney 1993); C.A. App. 43, 57, 83.

The centers principally serve longshore workers and retirees (and their dependents) whose labor contracts entitle them to receive health care at the centers. C.A. App. 78. The centers also provide services to members of other ILA locals who are employed by non-longshore employers ("outside employers") and whose contracts also entitle them to health care at the centers, *ibid.*; to members of the Port Police and Guards Union (PPGU) which, through its own ERISA-covered welfare plan (the NYSA-PPGU Welfare Fund), contracts with the NYSA-ILA Fund for the treatment of its members on a fee-for-service basis at the centers, C.A. App. 79, 81; and to local union officers and employees, *ibid.*

The centers receive income from a variety of sources. First, they receive payments directly from Fund participants for annual registration fees and prescription co-payments. C.A. App. 76, 82, 143-144. Second, they receive payments from workers' compensation insurance carriers for services rendered to Fund participants injured on the job. C.A. App. 76, 82. Third, each of the centers receives contributions from nearby employers calculated on the basis of hours worked by Fund participants, as provided by labor contracts.[2] C.A. App. 76, 81. Fourth, the centers receive payments from the NYSA-PPGU Welfare Fund for services rendered to its participants on a fee-for-service basis. *Ibid.* Under the New York law, all of those categories of income constitute receipts from patient care services, and the HFA has been assessed against them. A fifth category of income—weekly remittances from the Fund for operating expenses on an as-needed basis—has not been subject to the assessment. C.A. App. 80.[3]

From January through November 1991, the centers filed reports and paid the 0.6% assessment applicable to diag-

[2] Although some employers send their contributions directly to the closest medical center, others (especially those who operate at more than one location) send their contributions to the Fund, which in turn funnels the money on an as-needed basis to the medical centers. C.A. App. 80-81; see note 3, *infra*.

[3] The remittances derive from employer contributions to the Fund for Fund participants and contributions for local union officers and employees based on hours of work. C.A. App. 80-81. The Fund maintains that those remittances are akin to a grant that is nonassessable income under the New York law, Pet. 4 (citing C.A. App. 84), and the State has not attempted to apply the HFA to those monies. Pet. App. 8a; see *id.* at 13a. The assessability of remittances from the Fund to the centers is therefore not at issue in this case. *Id.* at 8a. Application of the assessment to operating income derived from such activities as records reproduction fees, which respondents do not challenge, is also not at issue. *Id.* at 9a.

nostic and treatment centers on revenues the centers received for patient care services. Pet. App. 8a; see C.A. App. 143, 138.[4] Thereafter the Fund placed its assessments into escrow and ceased filing reports. Pet. App. 8a; C.A. App. 21-22. Beginning in 1992, payment of registration fees by Fund participants and service fees by the NYSA-PPGU Welfare Fund was redirected to the Fund instead of to the centers. Pet. App. 8a; C.A. App. 86.

3. In 1992 respondents brought this action to invalidate and enjoin enforcement of the HFA on the ground that it is preempted by Section 514(a) of ERISA, 29 U.S.C. 1144(a), "insofar as [the HFA] imposes a levy on contributions and payments for health care benefits provided by the Fund." Pet. App. 9a.[5] ERISA's preemption clause provides that ERISA supersedes all state laws that "relate to" an ERISA plan. 29 U.S.C. 1144(a).

On cross motions for summary judgment, the district court held that ERISA does not preempt the HFA.[6] Pet. App. 19a. Relying on *Aetna Life Insurance Co.* v. *Borges*, 869 F.2d 142 (2d Cir.), cert. denied, 493 U.S. 811 (1989), the district court reasoned that the HFA is a tax law of general application because "it is not specifically directed at ERISA plans but applies to all health care facilities." Pet. App. 21a. The court observed that the tax "does not interfere with the calculation of benefits" or with "the determination of an employee's eligibility for benefits,"

[4] For that period the Fund paid $7,066 on assessable income of $1,177,670 (patient receipts and operating income). Pet. App. 8a; C.A. App. 84-85.

[5] Petitioners also sought "compensatory damages equal to the amounts paid to" the State, plus interest, costs and fees. C.A. App. 23.

[6] The district court did not reach the State's defenses under the Tax Injunction Act, 28 U.S.C. 1341, and the Eleventh Amendment. Pet. App. 19a.

and that the HFA's "impacts on benefit plans are incidentally economic resulting only in the need for administrative and accounting procedures to comply with the law." *Ibid.* The court also concluded that the economic impact of the 0.6% assessment is not substantial. *Id.* at 22a.

4. The court of appeals reversed. Pet. App. 6a-14a. It rejected the district court's conclusion that the HFA is a law of general application, because the HFA "does not apply broadly to every sector of society" in the State, but rather "targets only the health care industry," which, "by definition, [is] the realm where ERISA welfare plans must operate." *Id.* at 12a. Because the HFA "operates as an immediate tax on payments and contributions which were intended to pay for participants' medical benefits," the court stated, it "directly affects the Fund in its principal role" as a provider of health care benefits to plan participants and beneficiaries. *Ibid.* The court thus concluded that the HFA "relates to" the Fund because it "depletes those assets earmarked for the provision of health care benefits," and would cause the plan either to reduce benefits or increase charges. *Ibid.* In the court's view, those consequences would "detrimentally affect the central mission and purpose of the Fund," and therefore are not "remote or tenuous." *Ibid.*

Further, the court stated, it makes no difference that the Fund could avoid the HFA by "restructuring its finances so that funds formerly remitted by plan participants and employers directly to the medical centers would be remitted to the Fund which would subsequently transfer them to the centers"; in the court's view, state laws "that force plans to change their traditional methods of administration or to adopt different methods on a state-by-state basis" are preempted by ERISA. Pet. App. 13a. Finally, the court concluded, a state law does not escape

ERISA preemption merely because its economic impact on ERISA plans is de minimis. *Id.* at 14a.

5. This Court granted the State's petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of its intervening decision in *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 115 S. Ct. 1671 (1995). Pet. App. 5a. This Court held in *Travelers* that New York statutes imposing 9%, 11% and 13% surcharges on hospital care paid for by health maintenance organizations and commercial insurers did not "relate to" ERISA plans within the meaning of Section 514(a), and thus were not preempted. 115 S. Ct. at 1674. Determining that the surcharge statutes did not "make 'reference to'" ERISA plans, the Court analyzed whether they nevertheless had a "connection with" the ERISA plans. *Id.* at 1677; see *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). The Court observed that ERISA preempts state laws that "mandate[ ] employee benefit structures or their administration" or "provid[e] alternative enforcement mechanisms" for ERISA claims. 115 S. Ct. at 1678. Unlike those effects, the Court reasoned, the surcharge statutes had only "an indirect economic effect on choices made by insurance buyers, including ERISA plans." *Id.* at 1679. The Court noted that the surcharge statutes did not "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself." *Ibid.* Nor, the Court reasoned, did the "indirect influence of the surcharges preclude uniform administrative practice or the provision of a uniform benefit package." *Ibid.*

6. On remand from this Court, the Second Circuit adhered to its original decision in this case. Pet. App. 1a-4a. The court of appeals observed that the surcharges in *Travelers* were imposed not "on ERISA plans themselves,

but on insurance carriers providing health insurance coverage to the plans and their beneficiaries." *Id.* at 3a. Those surcharges, the court stated, "raised costs to the patient, who remained liable for the balance of any bill" not paid by insurance or an ERISA plan. *Ibid.* Accordingly, the court stated, the surcharges '"operat[ed] as an indirect source of merely economic influence'" on plan decisions. *Ibid.*, quoting *Travelers*, 115 S. Ct. at 1680. The court distinguished the HFA on the ground that "there is no third party between the plan and the tax imposed pursuant to the HFA," so that the HFA "depletes the Fund's assets directly." Pet. App. 3a-4a. Thus, the court concluded, "[n]othing in *Travelers* undermines our reliance on the HFA's direct economic impact upon the Fund as a basis for finding ERISA pre-emption nor precludes a determination that a state law's direct economic impact on ERISA plans is sufficient for a finding of preemption." *Id.* at 4a.[7]

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[7] The court of appeals' analysis on remand in the instant case was foreshadowed by its decision on remand in *Travelers*. This Court had remanded the case to the court of appeals to determine whether the 13% surcharge applicable to hospital bills incurred by members of "self-insured funds" was preempted. 115 S. Ct. at 1675 n.4. On remand, the Second Circuit held that the 13% surcharge did not relate to "self-insured funds." *Travelers Ins. Co.* v. *Pataki*, 63 F.3d 89, 93-94 (1995). The court distinguished the HFA from the 13% surcharge on the ground that the HFA directly depletes plan assets, whereas self-insured plans are "not directly liable for the surcharge." *Id.* at 94. The court questioned, however, whether it "should continue to distinguish between laws that directly deplete ERISA plans' assets and laws that only indirectly do so." *Ibid.* In the court's decision on remand in the instant case, it did not cite to its remand decision in *Travelers*.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 514(a) of ERISA provides that, with certain exceptions not relevant here, ERISA "shall supersede any and all State laws insofar as they * * * relate to any employee benefit plan" covered by the Act. 29 U.S.C. 1144(a). Because the key term "relate to" is of indefinite scope, the application of that provision has posed difficult problems, and this Court has therefore adjudicated numerous cases in recent years in which parties have claimed that Section 514(a) preempts a variety of state laws insofar as they are applied to or affect ERISA plans. As a result of those cases, certain key principles concerning the scope and limits of the term "relate to" can now be summarized in a more concrete form than was hitherto possible, thus providing additional guidance to the lower courts and obviating some of the confusion that has been present in this area.

Congress intended that the regulation of ERISA-covered employee benefit plans be exclusively an area of federal concern. Therefore, in areas where ERISA itself provides law or remedies, Congress intended that Section 514(a) broadly preempt the field of state regulation. Moreover, even in areas where ERISA does not itself provide law or remedies, Congress's occupation of the field precludes the States from attempting to impose their own ideas—regardless of how salutary—regarding the structure and administration of benefit plans. For that reason, state laws that specifically refer to ERISA plans are also preempted. Beyond that area, this Court's cases establish that Congress intended a further area of preemption, since it intended to leave to the private parties involved— primarily the employer and employee—the basic substantive decision regarding what benefits should be provided.

Thus, state laws that require employers to offer particular benefits are also preempted (unless preserved by the savings clause, 29 U.S.C. 1144(b)).

There is no basis for extending preemption under Section 514(a) to state laws of general applicability that do not fall within any of the above categories. ERISA plans frequently choose to provide benefits by entering an area of commerce or activity traditionally governed by state laws that are applicable to many others who also operate in that area. By conducting activities in the regulated area, the ERISA plan subjects itself to the same state laws that governs all other actors within the State. Thus, ERISA plans that offer medical services remain subject to generally applicable, plan-neutral state regulation of (and taxation of) medical care, just as ERISA plans that offer other kinds of services remain subject to generally applicable, plan-neutral state regulation of those services. A State may, through such laws of general application, regulate or tax an activity in a way that adds to its costs or limits the way in which the activity may be conducted in the State by anyone, including plans, but it cannot direct employers to provide a particular plan benefit or prohibit them from providing a benefit that is permitted outside ERISA plans.

Under the foregoing principles, the Second Circuit's decision holding the HFA preempted must be reversed. The HFA tax does not prescribe any law in any field for which ERISA itself furnishes governing law, since ERISA itself contains no provision for the regulation of hospitals. Nor does the HFA tax make any reference to ERISA plans or otherwise treat them differently from all other owners of hospitals in the State. Nor does the HFA tax require or prohibit employers or plans to offer any specific employee benefits. In those circumstances, because the HFA is a

tax of general applicability, and because it undoubtedly operates in an area of traditional state regulation, it does not "relate to" ERISA plans. The HFA relates, rather, to the provision of hospital services in New York. Accordingly, it is not preempted by Section 514(a).

The Second Circuit erred in holding that the fact that the ERISA plan (or, more precisely, the hospital that the plan owned) must directly pay the tax is sufficient to warrant preemption. ERISA preemption is not limited to direct state regulation; it applies, for example, to all state laws that "purport[] to regulate, directly or indirectly," ERISA plans. 29 U.S.C. 1144(c)(2). Nor do this Court's decisions, which have held some "indirect" state regulation preempted while permitting some "direct" state regulation to stand, make the characterization of a state law as "indirect" or "direct" dispositive of the preemption issue. Finally, if the Second Circuit's theory that "direct" regulation is necessarily preempted were correct, virtually every state regulation of health care—in addition to regulation of legal services, day care for children, and other areas of traditional state health and safety regulation—would be inapplicable to ERISA plans that choose to provide those services themselves rather than purchasing them from others. This Court held in *Travelers* that Congress "could not possibly have intended" to eliminate "myriad state laws in areas traditionally subject to local regulation." 115 S. Ct. at 1683. The Second Circuit's theory therefore must be rejected.

ARGUMENT

APPLICATION OF NEW YORK'S HOSPITAL FACILITY ASSESSMENT TO THE HEALTH CARE FACILITIES OPERATED BY RESPONDENTS IS NOT PREEMPTED BY SECTION 514(a) OF ERISA

A. Section 514(a) Of ERISA Does Not Preempt A Generally Applicable State Law In An Area Of Traditional State Regulation, So Long As The Law Does Not Operate In A Field In Which ERISA Itself Provides Governing Standards, Makes No Reference To ERISA Plans, And Does Not Require That Plans Or Employers Provide Any Particular Benefits

Section 514(a) of ERISA provides that, with certain exceptions not relevant here, ERISA "shall supersede any and all State laws insofar as they * * * relate to any employee benefit plan" covered by the Act. 29 U.S.C. 1144(a). This Court has addressed that provision numerous times in recent years in a variety of contexts. What has emerged from this Court's decisions are four basic propositions regarding the scope of ERISA preemption, each of which governs a distinct category of state laws challenged under Section 514(a). We do not contend that recognition of these categories would automatically resolve all of the difficult questions regarding ERISA preemption. But we believe that it is useful to distinguish the different sorts of cases that arise in order to identify the factors that determine the preemption issue in each class of cases.

1. *Where ERISA provides law governing an area, preemption of state law in that field is very broad.* Where ERISA itself provides governing legal standards, preemption under Section 514(a) is at its broadest. In those areas, ERISA's "deliberately expansive" language was "designed to 'establish pension plan regulation as

exclusively a federal concern.'" *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 46 (1987). Specifically, ERISA "imposes participation, funding, and vesting requirements on pension plans"; it "sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans"; and it includes "a carefully integrated civil enforcement scheme that is one of the essential tools for accomplishing the stated purposes of ERISA." *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 137 (1990) (internal quotation marks omitted). Because ERISA therefore broadly governs the rights, duties, and remedies of plan participants and beneficiaries vis-a-vis plan fiduciaries and employers, state laws that also regulate those areas are preempted.

In *Ingersoll-Rand*, for example, this Court held preempted a state-law wrongful discharge action based on a claim that an employer discharged an employee to avoid contributing to the employee's pension plan. The court reached that conclusion in part because the state-law cause of action "conflicts directly" with the ERISA-created, exclusively federal cause of action under ERISA Section 502(a) and (e), 29 U.S.C. 1132(a)(3), (e). *Ingersoll-Rand*, 498 U.S. at 143; see ERISA § 510, 29 U.S.C. 1140 (prohibiting interference with rights protected under ERISA or a benefit plan). For similar reasons, the Court held in *Pilot Life Ins. Co.* that "common law causes of action * * * based on alleged improper processing of a claim for benefits under an employee benefit plan undoubtedly meet the criteria for pre-emption under § 514(a)" because they conflict with ERISA's exclusive civil enforcement remedies. 481 U.S. at 48; see 29 U.S.C. 1132(a).[8] In

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[8] *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), is governed by the same principles. In that case, the Court first concluded that "Congress expressly preserved the option of pension fund integra-

areas such as these, the existence of federal law precludes the States from applying their own law or creating their own causes of action, even if their own law or remedy is claimed to be supplementary to or supportive of the underlying goals of ERISA.

2. *Where ERISA itself does not provide governing legal standards, state laws specifically referring to ERISA plans are nonetheless preempted.* ERISA does not, however, "pre-empt only state laws dealing with the subject matters covered by ERISA—reporting, disclosure, fiduciary responsibility, and the like." *Shaw* v. *Delta Air Lines*, 463 U.S. at 98. Where ERISA itself does not provide law governing an area, state laws are still preempted if they refer to employee benefit plans and single them out for special treatment. For example, in *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829-830 (1988), this Court held that a state law exempting ERISA plans from generally applicable garnishment procedures was preempted by Section 514(a). The law's defect was that it "expressly refers to—indeed, solely applies to—ERISA employee benefit plans." 486 U.S. at 829. Similarly, i.. *District of Columbia* v. *Greater Washington Bd. of Trade*, 506 U.S. 125 (1992), the Court held preempted a local law requiring employers to provide employees receiving workers compensation with health insurance

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tion"—defined as the practice of determining benefits "by combining pension funds with other income streams available to the retired employees"—when it enacted ERISA. 451 U.S. at 514. The Court also noted that that practice had been sanctioned by a valid Department of Treasury regulation. 451 U.S. at 517-521. The Court concluded that the New Jersey statute at issue in that case was preempted "because it eliminates one method for calculating pension benefits—integration—that is permitted by federal law." 451 U.S. at 524. See also *FMC* v. *Holliday*, 498 U.S. 52 (1990) (ERISA preempts law barring plans from enforcing subrogation claims on benefits).

equivalent to "the existing health insurance coverage" provided by the employer to other employees. 506 U.S. at 130. Because the "existing health insurance coverage" was necessarily "a welfare benefit plan under ERISA," the Court held that the local law "specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted." *Ibid.*; see also *Ingersoll-Rand*, 498 U.S. at 136; *FMC Corp.* v. *Holliday*, 498 U.S. at 59.[9]

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[9] The lower courts have uniformly held that state tax laws that are specifically directed at ERISA plans "relate to" plans. See *E-Systems, Inc.* v. *Pogue*, 929 F.2d 1100, 1101, 1103 (5th Cir.) (state law that imposed a 2.5% tax expressly on plan administrators' fees and on claims and benefits paid under a plan is preempted), cert. denied, 502 U.S. 981 (1991); *General Motors Corp.* v. *California Bd. of Equalization*, 815 F.2d 1305, 1309 (9th Cir. 1987) ("tax * * * computed on the basis of benefits paid by the [self-insured ERISA-covered] plans" relates to plans because "reference to plan activities in computing the tax is unavoidable"), cert. denied, 485 U.S. 941 (1988); *Birdsong* v. *Olson*, 708 F. Supp. 792, 798 (W.D. Tex. 1989) (preempting same law as in *E-Systems*), appeal dismissed, 901 F.2d 1270 (5th Cir. 1990); *National Carriers' Conference Comm.* v. *Heffernan*, 454 F. Supp. 914, 915 (D. Conn. 1978) (state law that required "group maintaining [the] plan" to pay annual tax of 2.75% on "amounts paid as benefits" is a law "specifically directed at such plans exclusively" and is preempted) (citation omitted).

By the same token, courts have recognized that state tax laws that do not accord special treatment to plans are not preempted. See *Thiokol Corp., Morton Int'l, Inc.* v. *Roberts*, 76 F.3d 751, 753, 754-755 (6th Cir. 1996) (2.35% state tax imposed on business tax base that included employers' payments to ERISA plans "has, at most, a tenuous, remote, or peripheral effect" that does not warrant preemption), petition for cert. pending, No. 95-1913 (filed May 23, 1996); *Retirement Fund Trust of Plumbing* v. *Franchise Tax Bd.*, 909 F.2d 1266, 1281 (9th Cir. 1990) (State's "tax levy procedure does not single out ERISA trusts" and is a "neutral law of general application"); *Firestone Tire & Rubber Co.* v. *Neusser*, 810 F.2d 550, 551, 554 (1987) (2% city tax imposed on earned income of city residents that included employee contributions for ERISA plan benefits is a "neutral tax of general application" that is not preempted).

State laws referring to and singling out ERISA plans are preempted because Congress intended in passing ERISA to leave to federal law the field of regulation of ERISA-covered employee benefits. As this Court has noted, the congressional sponsors of ERISA referred to "the reservation to federal authority [of] the sole power to regulate the field of employee benefit plans" as the "crowning achievement" of the ERISA legislation. *Shaw*, 463 U.S. at 99 (quoting 120 Cong. Rec. 29,197 (1974) (statement of Rep. Dent)); see also *ibid.* (quoting 120 Cong. Rec. 29,933 (1974) ("substantive and enforcement provisions of [ERISA] are intended to preempt the field for Federal regulations") (statement of Sen. Williams)). Although state laws of general applicability that "function[ ] irrespective of the existence of an ERISA plan," *Ingersoll-Rand*, 498 U.S. at 139, may not be preempted even though they may affect the operation of ERISA plans, see *infra* pp. 19-23, the States may not attempt *specifically* to regulate that field. Because a state law that refers to employee benefit plans intrudes the State into the field reserved to federal law by Congress, it is preempted.[10]

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[10] This Court has not had occasion to address the limits of the "reference to" analysis. If a state law that is *not* one of general applicability clearly is intended to target ERISA employee benefit plans and single them out for special treatment, but is drafted so as to avoid explicit reference to such plans, the law may still be preempted under this principle. On the other hand, where a purely verbal reference to ERISA plans in a state law of general applicability is necessary to ensure that ERISA plans are treated the same as a broad class of other entities within an area subject to state control, the state law may in some circumstances avoid preemption. See, *e.g.*, *Thiokol Corp., Morton Int'l.*, 76 F.3d at 756-761; *New England Health Care Employees Union, District 1199* v. *Mount Sinai Hospital*, 65 F.3d 1024, 1032 (2d Cir. 1995); *NYS Health Maintenance Org. Conference* v. *Curiale*, 64 F.3d 794, 799-801 (2d Cir. 1995); *United Wire, Metal & Machine Health & Welfare Fund* v. *Morristown Memorial Hosp.*, 995 F.2d 1179, 1192 n.6 (3d Cir.), cert. denied, 510 U.S. 944 (1993).

3. *Where ERISA itself does not provide law governing an area, state laws requiring or prohibiting provision by employers of certain employee benefits through ERISA plans are preempted.* ERISA preemption extends to an additional category of cases. Where ERISA itself does not provide federal law governing an area, state laws are still preempted if they require employers to provide a particular employee benefit through an ERISA plan. For example, in *Shaw* v. *Delta Air Lines*, the Court held that New York's Human Rights Law and its Disability Benefits Law "relate[d] to" ERISA plans because they required employee welfare plans to provide benefits for pregnancy. 463 U.S. at 97; see *Travelers*, 115 S. Ct. at 1678. Similarly, in *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724 (1985), Massachusetts implicitly conceded (and the Court readily assumed) that its law, which required any employee welfare "fund" that provided hospital benefits also to provide minimum mental health benefits, related to self-insured ERISA plans. *Id.* at 730 n.11, 735 n.14; see *Travelers*, 115 S. Ct. at 1680.[11]

The rule that emerges from *Metropolitan Life* and *Shaw* is that States cannot tell employers which, if any, welfare benefits to offer employees. As a result, employers operating in a number of States can offer benefits to their employees on a uniform basis across the country, thereby avoiding the "considerable inefficiencies" resulting from "[a] patchwork scheme of regulation" that could in turn "lead those employers with existing plans to

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[11] Although "related to" ERISA plans under Section 514(a), the minimum mental health benefit was nonetheless saved from preemption by operation of the ERISA "savings" provision for state laws of insurance. *Metropolitan Life*, 471 U.S. at 739-749; see 29 U.S.C. 1144(b)(2)(A).

reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11 (1987); see also *FMC Corp.* v. *Holliday*, 498 U.S. at 60 ("Application of differing state subrogation laws to plans would therefore frustrate plan administrators' continuing obligation to calculate uniform benefit levels nationwide."); *Travelers*, 115 S. Ct. at 1677-1678; *Shaw*, 463 U.S. at 105 n.25. By precluding States from requiring plans to provide particular health or other benefits, ERISA also permits employers to be certain that employees in a mandated-benefit State would not receive those benefits at the expense of employees in another State that did not mandate those benefits.

Finally, to permit States to dictate the level of benefits would be inconsistent with Congress's considered decision that ERISA "not mandate that employers provide any particular benefits." *Shaw*, 463 U.S. at 91; see also *Travelers*, 115 S. Ct. at 1674 ("[t]he federal statute does not go about protecting plan participants and their beneficiaries by requiring employers to provide any given set of minimum benefits, but instead controls the administration of benefit plans"); *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1228 (1995) (ERISA does not "create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits.").[12] In reaching that conclusion, Congress determined that the public welfare would be maximized if the interested parties could tailor benefits packages to the financial resources that the

[12] Although ERISA does not "establish any minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans," *Curtiss-Wright*, 115 S. Ct. at 1228, that omission was deliberate. Therefore, state regulation of those subject matters for welfare plans would also be inconsistent with ERISA, as it would be for pension plans.

employer wanted to make available and the needs that the employees most wanted to satisfy. To permit the States to intrude on that decision by mandating particular benefits would conflict with Congress's determination that such decisions should be left to the private sector.[13]

4. *Where an employer or ERISA plan chooses to provide benefits by engaging in an activity subject to state regulation, it is subject to that regulation.* Outside the areas outlined above, ERISA plans that choose to undertake activities in areas over which the States have undoubted regulatory (and taxing[14]) authority generally remain subject to that authority in the same way as other entities in the State.[15] This Court has long acted on the "assumption

[13] A state law prohibiting plans from providing a particular benefit would raise similar concerns. However, as discussed below, a plan-neutral prohibition on a regulated activity that applies equally to plans and non-plans would not be preempted.

[14] Section 514(b)(5)(B)(i) of ERISA provides that "any State tax law relating to employee benefit plans" is not "exempt from subsection (a)" of Section 514. 29 U.S.C. 1144(b)(5)(B)(i). The history of Section 514(b)(5)(B)(i) is recounted in *Retirement Fund Trust of Plumbing* v. *Franchise Tax Bd.*, 909 F.2d 1266 (9th Cir. 1990), which concluded that "Congress intended, when it enacted § 514(b)(5), that state tax laws should receive precisely the same analysis as other state laws. Only state tax laws that 'relate to' ERISA plans are preempted." *Id.* at 1280; accord *Birdsong* v. *Olson*, 708 F. Supp. 792, 797 (W.D. Tex. 1989) ("state tax laws related to employee welfare benefit plans are preempted"), appeal dismissed, 901 F.2d 1270 (5th Cir. 1990); *Northwest Airlines, Inc.* v. *Roemer*, 603 F. Supp. 7, 12 (D. Minn. 1984) ("Congress intended to preempt state tax laws insofar as they relate to employee benefit plans"). Neither the district court, nor the court of appeals in its original and remand decisions, referred to Section 514(b)(5).

[15] Thus, in this case the Fund, a self-insured welfare plan, chose to provide hospital care through a facility that it owns and operates. If the Fund had instead chosen to purchase hospital care from hospitals directly or from insurers that provide such coverage, this case would be analytically identical to *Travelers*. Indeed, because this case, unlike

that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Travelers*, 115 S. Ct. at 1676; see also *Metropolitan Life*, 471 U.S. at 740. Congress itself provided no substantive standards in ERISA governing medical care, day care centers, or prepaid legal services—to name just a few of the areas in which ERISA plans operate. See 29 U.S.C. 1002(1). Nothing in ERISA suggests that Congress intended that those areas should be entirely free of state regulation (and thus of *all* governmental regulation) whenever they happen to be provided in kind by an ERISA plan. See *Travelers*, 115 S. Ct. at 1683 (state regulation of medical care is "no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate").

In short, although Congress in enacting ERISA meant to establish plan regulation "as exclusively a federal concern," *Travelers*, 115 S. Ct. at 1677 (quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)), Congress did not intend similarly to federalize the regulation of hospitals, lawyers, or day care centers. See, *e.g.*, *Harmon City, Inc.* v. *Nielsen & Senior*, 907 P.2d 1162 (Utah 1995) (legal malpractice claims against plan attorneys not preempted). Indeed, it would be extraordinary if a Congress that was intent on protecting the rights of plan participants and beneficiaries, see 29 U.S.C. 1001, in fact deprived those parties of the protection of traditional state regulation merely because the services ordinarily subject to that regulation were provided by ERISA plans. Such state

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Travelers, involves a tax that is imposed at a uniform rate and that therefore has *no* effect on a plan's decisions about how to provide medical care, the state assessment here has less of an impact on plan decisions than did the state assessments in *Travelers*.

regulation "relates to" the various subject matters to which it applies—medical care, legal services, day care for children, etc.; it does not relate to ERISA plans *as such*, or address the subject matter (the furnishing of employee benefits) that sets ERISA plans apart from other entities. In that critical sense, such regulation affects "employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' [ERISA] plans." *Shaw*, 463 U.S. at 100 n.21. See also *Greater Washington Bd. of Trade*, 506 U.S. at 130 n.1 (laws of "general applicability" frequently not preempted).[16]

The fact that state regulation in this category may have effects—even substantial effects—on ERISA plans does not alter the analysis. That principle was established by this Court's decision in *Travelers*. The Court in *Travelers* held that ERISA did not preempt New York statutes setting surcharges on hospital costs depending on whether they were paid for by a Blue Cross/Blue Shield plan, a commercial insurer, or an HMO.[17] The surcharges

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[16] There was no need for Congress to "save" such traditional areas from preemption as it did expressly for insurance, banking, and securities laws. Traditional state regulation and taxation of social welfare activities or the professions does not "relate to" plans insofar as ERISA does not itself provide law on those subjects; insurance, banking and securities laws, in contrast, are "saved" even if they do "relate to" plans. *Metropolitan Life*, 471 U.S. at 741-742.

[17] The Court remanded for consideration of whether the 13% surcharge on "self-insured funds" was preempted. *Travelers*, 115 S. Ct. at 1675 n.4. The United States stated in its amicus curiae brief at the petition stage in *Travelers* that "[a]pplication of the 13% surcharge to 'self-insured funds' *may* raise some distinct issues," not that it "*would* present entirely distinct issues," as respondents assert (Br. in Opp. 6 n.4; emphasis added). See Brief for the United States as Amicus Curiae at 14 n.5 in Nos. 93-1408, 93-1404, and 93-1415 (filed Sept. 14, 1994). The distinct issue we had in mind—but which was not before the Court—was whether the 13% surcharge payable by "self-insured funds" (but

have an impact on plans because they affect "the relative costs of competing insurance to provide [benefits]" and because they "bear[] on the costs of benefits"—like any regulation of "[q]uality standards" or "employment conditions"—by driving up the costs of the benefits. 115 S. Ct. at 1679. Yet the Court held that neither the effect on plan choice nor the modest overall draw on plan assets caused by the surcharges sufficed for preemption, because the New York scheme "leaves plan administrators right where they would be in any case, with the responsibility to choose the best overall coverage for the money." 115 S. Ct. at 1680. Such a scheme does not implicate "[t]he basic thrust of the pre-emption clause," 115 S. Ct. at 1677-1678, because it does not "preclude uniform administrative practice or the provision of a uniform interstate benefit package if a plan wishes to provide one," 115 S. Ct. at 1679. Therefore, it does not "relate to" ERISA plans within the meaning of Section 514(a).[18] See also *Mackey*, 486 U.S. at

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not other favored payors like Blue Cross/Blue Shield) necessarily singled out self-insured plans for special treatment and thus "relate[d] to plans" for that reason. Here, no distinct analysis is necessary because the tax applies generally to hospitals and is entirely neutral with respect to ERISA plans.

[18] This Court in *Travelers* left open the question whether ERISA would preempt a state regulation that produced such an "acute" economic effect "as to force" an ERISA plan "to adopt a certain scheme of substantive coverage or effectively restrict its choice" of benefits or the manner in which they will be provided. *Travelers*, 115 S. Ct. at 1683. That question likewise need not be answered here, because the 0.6% HFA is not such "an exorbitant tax" or "so prohibitive" in its effect that it compels the Fund to cease providing hospitalization coverage, reduce the level of that coverage, or provide the coverage through other than Fund-owned facilities. *Id.* at 1681. Indeed, the HFA has even *less* effect on ERISA plans than the 9%, 11%, and 13% surcharges in *Travelers* because the HFA's uniform, low rate is not

830-841 (generally applicable state garnishment law held applicable to ERISA plans and not preempted under Section 514(a)).

We acknowledge that drawing the line between forbidden state regulation of what benefits an employer must provide and permitted state regulation of an area of commerce or activity in which a plan chooses to operate may not always be easy. But the broad outline of the distinction between a State's requirement that a plan provide certain benefits, as in *Metropolitan Life* or *Shaw*, and a State's requirement that plans abide by state regulations applicable to others similarly situated in the State, as in *Travelers* or *Mackey*, is clear. Although employer and employee must be left free to decide what package of hospitalization, day care, or legal services will best satisfy their needs, ERISA does not provide them with a means of opting out of generally applicable state laws regulating those areas simply by choosing to include them in an ERISA plan.

B. The HFA Is Not Preempted Under The Foregoing Principles Governing The Application Of Section 514(a) Of ERISA

1. Under the above analysis, the New York tax, as applied in this case, does not "relate to" an ERISA plan within the meaning of Section 514(a) of ERISA. First, the HFA has no effect on any of the fields in which ERISA itself provides governing law. When it enacted ERISA, Congress included no provisions concerning the regulation or taxation of hospitals, and New York's HFA tax does not affect any of the areas—such as reporting, disclosure, fiduciary responsibility, or civil enforcement—in

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designed to and will not have any effect on plans regarding what kind of health care to provide or how to provide it.

which ERISA set forth standards to govern employee benefit plans.

Second, the HFA does not itself refer to ERISA plans. To the contrary, the HFA statute is a law of general application because it applies to all "hospitals" without regard to their ownership, their patient composition, or the ultimate source of patient revenues subject to the tax. Cf. *United Wire, Metal & Machine Health & Welfare Fund* v. *Morristown Memorial Hosp.*, 995 F.2d 1179, 1192 n.6 (3d Cir.), cert. denied, 510 U.S. 944 (1993). The HFA operates in an area of traditional state regulation and "makes no reference to, [and] indeed functions irrespective of, the existence of an ERISA plan." *Ingersoll-Rand*, 498 U.S. at 139.[19]

Third, the HFA does not require (or forbid) employers or plans to provide any particular level of medical benefits to plan participants or beneficiaries. The HFA does not require the Fund to "provide a certain kind of benefit to cover a specified illness or procedure," *Metropolitan Life*, 471 U.S. at 728, or mandate that the Fund cover specified categories of persons defined by age or condition, *id.* at 729, such as infants, the elderly, or the disabled. Employers and ERISA plans in New York, as in other States, remain free to provide as much or as little hospital care as they desire.

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[19] If the HFA *did* expressly exempt plan-owned hospitals from the tax, which is the result respondents seek to achieve in this litigation, the exemption would be preempted as a law that refers to an ERISA plan and thereby "singles out ERISA employee welfare benefit plans for different treatment." See *Mackey* v. *Lanier Collection Agency & Servs., Inc.*, 486 U.S. 825, 830, 838 n.12 (1988). It would be an odd rule of preemption that required a court to carve out an exemption from a state law of general applicability in such circumstances, yet prohibited a State from including the very same exemption in its own law in the first place out of respect for the very same principles of preemption.

The HFA tax therefore does not fall within any of the three categories in which this Court has previously found ERISA preemption. The tax does, however, fall squarely within the fourth category described above: situations in which an employer or ERISA plan chooses to provide benefits by engaging in an activity subject to traditional state regulation of general application. It is therefore subject to that regulation. Respondents could have provided hospitalization benefits to plan participants either by purchasing hospitalization insurance, by reimbursing participants from plan funds for hospitalization expenses, or by negotiating directly with HMOs or local hospitals to provide hospitalization for plan participants. They chose none of those options, but instead decided to operate a hospital themselves. Nothing in ERISA suggests that by making that choice, respondents were also able to immunize themselves from all of the mechanisms—including generally applicable taxes—of state hospital regulation.[20]

Significantly, moreover, the HFA operates in the same realm as the surcharges upheld in *Travelers*, the regulation of health care. The Court observed in *Travelers* that "general health care regulation * * * historically has been a matter of local concern," and the Court concluded that "nothing in the language of [ERISA] or the context of

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[20] In *California Division of Labor Standards Enforcement* v. *Dillingham Construction, N.A.*, No. 95-789 (argued Nov. 5, 1996), we argued that the same rule was applicable in that case. The state regulation concerning apprenticeship training at issue there did not refer to ERISA plans because not all apprenticeship training is conducted through ERISA plans. See 95-789 U.S. Br. 12-13 (discussing *Massachusetts* v. *Morash*, 490 U.S. 107 (1989)). Therefore the regulation was a generally applicable law that an employer could not simply disregard because the employer in that case happened to choose to provide apprenticeship training through an ERISA plan. (We have provided copies of our brief in *Dillingham* to the parties in this case.)

its passage indicates that Congress chose to displace" such regulation. 115 S. Ct. at 1680.[21] In both *Travelers* and in this case, the state law has an effect on ERISA plans only because, and to the extent that, plans have chosen to engage in activity that is covered by the generally applicable state law. That incidental effect is too "tenuous, remote, or peripheral" to warrant a finding that the law 'relates to' ERISA plans. *Travelers*, 115 S. Ct. at 1680; *Shaw*, 463 U.S. at 100 n.21.

3. In its decision in this case on remand from this Court, the Second Circuit relied on a single factor to justify its adherence to its prior view that the HFA was preempted. Holding that "a state law's direct economic impact on ERISA plans is sufficient for a finding of preemption," Pet. App. 4a, the court below decided the case on the ground that the HFA constitutes a direct imposition because "there is no third party between the plan and the [HFA] tax," Pet. App. 3a. The court erred in holding that the single factor of direct economic impact on ERISA plans is a sufficient basis to warrant preemption.

The text of ERISA's preemption provision establishes that state laws that relate to ERISA plans "directly or indirectly," are superseded, see 29 U.S.C. 1144(c)(2), and this Court has not suggested that the "direct" or "indirect" nature of a state law's effect on ERISA plans is dispositive of whether the law relates to plans.[22] See *e.g.*,

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[21] In its original opinion in this case, the court of appeals reasoned that "the HFA targets only the health care industry," and "[b]ecause this industry is, by definition, the realm where ERISA welfare plans must operate," the HFA relates to plans and is preempted. Pet. App. 12a. *Travelers* established that that reasoning is mistaken.

[22] Respondents mischaracterize (Br. in Opp. to Pet. 6 n.4) the United States' position in *Travelers*. In urging that the indirect economic effects of the New York surcharges were insufficient for ERISA preemption, we expressed the broader view that "[a] state regulation does not relate to plans so long as its only effect is to subject all buyers in a broad-based market in which ERISA plans and others substantially participate to a single set of marketplace incentives." Brief for the United States as Amicus Curiae Supporting Petitioners at 9 in Nos. 93-1408, 93-1414 and 93-1415 (filed Nov. 15, 1994). The United States never contended, as respondents here have suggested, that the preemption analysis turns solely on the indirect or direct nature of the regulatory impact.

Travelers, 115 S. Ct. at 1678-1681. The Court in *Travelers* did refer to New York's surcharge statutes in terms of their "indirect economic influence" on plan choices. 115 S. Ct. at 1679. But that was because the only question before the Court in *Travelers* was whether the surcharges—which were not directly paid by plans—were preempted. Indeed, this Court has recognized that laws whose "effect is only indirect" may also relate to plans and be preempted. *Ingersoll-Rand*, 498 U.S. at 139; accord *Alessi*, 451 U.S. at 525; see *Travelers*, 115 S. Ct. at 1683. By the same token, this Court has held that ERISA does not preempt a generally applicable state garnishment law even as it applies to "participants' benefits in the hands of an ERISA welfare benefit plan." *Travelers*, 115 S. Ct. at 1680 (describing *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, *supra*); see *Mackey*, 486 U.S. at 841 ("ERISA does not forbid garnishment of an ERISA welfare benefit plan, even where the purpose is to collect judgments against plan participants"). The court of appeals was therefore wrong to conclude that the HFA "relates to" plans, within the meaning of Section 514(a) of ERISA, because it "imposes 'an immediate tax on payments and contributions which were intended to pay for participants' medical benefits.'" Pet. App. 4a (quoting its original decision).

If the Second Circuit were correct that "direct economic impact" is sufficient to warrant preemption, virtually every state law that taxes or regulates hospital care

would be invalidated insofar as it applies to hospitals owned by ERISA-covered plans. For example, payment of generally applicable unemployment compensation taxes, payroll taxes or real property taxes by a plan-owned hospital depletes plan assets at least as "directly" as payment of the provider tax here. See *Boyle* v. *Anderson*, 68 F.3d 1093, 1106-1107 (8th Cir. 1995), cert. denied, 116 S. Ct. 1266 (1996); *Morgan Guar. Trust Co.* v. *Tax Appeals Tribunal*, 587 N.Y.S.2d 252 (N.Y. 1992) (ERISA preempts state tax on gain from property transfer when applied to transfer of plan-owned property). Similarly, state laws that impose quality control or workplace standards on hospitals have an impact on plans that own hospitals that is fully as "direct" as the impact of the provider tax. In both situations, the law's effect necessarily falls on the plan because the plan provides hospital care rather than purchasing it from third-party providers in the marketplace. Indeed, if "directness" of a law's impact were the test of ERISA preemption, New York State's basic licensing laws could not survive in this setting, because they require "hospitals" to conform to state-approved systems of cost analysis, reporting and audits, and to maintain "premises, equipment, personnel, rules and by-laws, standards of medical care, and hospital service" that are "fit and adequate" according to state law.[23] N.Y. Pub. Health Law § 2805(1) and (2)(b) (McKinney 1993).

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[23] The breadth of the Second Circuit's decision is demonstrated by the court's decision to hold the HFA preempted as to *all* receipts for patient care by the Fund's centers—even when the Fund is merely acting like any other hospital in providing services to patients that are *not* paid for out of Fund assets. Thus, under the Second Circuit's decision, even when the Fund's hospitals treat patients who are not beneficiaries of the Fund (such as members of the PPGU) or whose care is paid for by workers' compensation, the income from those activities is immune from the HFA.

More broadly still, the court of appeals' reasoning leads to the conclusion that ERISA plans are exempt from a host of state laws that may tax or regulate the provision of other benefits and services that ERISA welfare plans provide in kind rather than purchase from third parties. In addition to hospital and medical services, welfare benefits may include death benefits, day care services and prepaid legal services. 29 U.S.C. 1002(1); see 29 U.S.C. 186(c). Application of the court of appeals' "direct effect" test would invalidate, as applied to plan-owned service providers, state laws that tax client funds escrowed with attorneys, staffing requirements for day care centers, and embalming procedures for funeral homes. It would also invalidate ethical requirements and malpractice laws insofar as such providers are concerned. In short, the court of appeals' reasoning would lead to preemption of myriad state laws that constitute an otherwise valid exercise of a state's traditional police powers, a result that "would effectively read the limiting language in § 514(a) out of the statute." *Travelers*, 115 S. Ct. at 1679. Moreover, federal preemption would leave a void in these areas historically regulated by States, and possibly serve as an invitation to unscrupulous operators to set up ERISA plans to avoid state regulation in those fields.[24]

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[24] Ironically, although the result would be to tend to decrease plan costs, it would not eliminate the impact of the preempted state laws. To the contrary, those laws would still have a dramatic impact on plan choice; if ERISA plans were the only entities in the State entitled to provide hospital services, legal services, day care, and the like, without paying state taxes or obeying state regulations, the resulting economic impact would surely drive many ERISA plans to provide such services themselves rather than contracting with others to provide them.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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